Filed 11/15/16 Reid v. Barnes CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DEBRA ANN REID, Plaintiff and Appellant, v. GERALD BARNES et al., Defendants and Respondents.	B261810 (Los Angeles County Super. Ct. No. BC491130)

APPEAL from judgment of the Superior Court of Los Angeles County, Robert L. Hess, Judge. Affirmed in part and reversed in part.

Debra Ann Reid, in pro. per., for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

INTRODUCTION

Debra Ann Reid sued her mother, Ethel Barnes, and her stepfather, Gerald Barnes, for breach of contract, fraud, and other claims relating to the purchase and ownership of the house in which Reid lives. The Barneses filed a cross-complaint asserting common counts and Gerald Barnes filed a separate unlawful detainer action. After consolidating the actions, the trial court conducted a court trial and entered judgment in favor of the Barneses and against Reid on the complaint, entered judgment in favor of Reid and against Gerald Barnes on the unlawful detainer complaint, and awarded the Barneses $39,800 on their cross-complaint. On appeal Reid argues primarily that the testimony at trial, for which there is no reporter's transcript or settled statement, did not support the judgment. We affirm the judgment on Reid's complaint, affirm the judgment on Gerald Barnes's unlawful detainer complaint, and reverse the judgment on the Barneses' cross-complaint.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Pleadings*

In 2012 Reid filed this action against the Barneses for breach of contract, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, fraud, unjust enrichment, constructive trust, equitable lien, and intentional infliction of emotional distress. Reid alleged that in 1996 she and the Barneses orally agreed the Barneses would obtain a loan through the Veterans Administration to purchase a house for Reid on West 134th Place in Gardena, California, and Reid would pay all expenses related to the acquisition and maintenance of the

property, including the down payment, payments due on the loan, taxes, utilities, and any improvements. The parties also allegedly agreed Reid would be the "true owner" of the property and the Barneses would transfer the deed to the property to Reid upon her request. It appears the parties structured the transaction in this way to defraud the United States and the Barneses' creditors.[1]

---

[1] "Title III of the Servicemen's Readjustment Act of 1944, Pub.L. No. 346 (78th Cong., 2d Sess.), 58 Stat. 291, as amended, codified at 38 U.S.C. §§ 3701-33, authorizes the VA [United States Department of Veteran Affairs] to provide housing assistance to veterans in the form of home loan guaranties when loans are extended by private lenders and, in some circumstances, direct loans. . . . Under 38 U.S.C. § 3710, certain loans to veterans made pursuant to the provisions of chapter 37 of Title 38 are 'automatically guaranteed' when made for one of several enumerated purposes, including the purchase or construction of a residence to be used as a home. 38 U.S.C. § 3710(a). The amount of a guaranty available to a veteran for a particular loan is computed in accordance with a formula set forth in the statute. 38 U.S.C. § 3703(a)(1). . . . If the VA guarantees a loan for an eligible veteran and the veteran defaults on that loan, the VA is required to reimburse the private lender for any deficiency that arises as a result of the default up to the full amount of the guaranty." (*Ayes v. U.S. Dept. of Veterans Affairs* (E.D.N.C. 2005) 2005 WL 6124843, at p. 2.) The dwelling must be owned and occupied by the veteran. (See U.S.C. § 3710(a)(1).) Efforts by nonveterans, like Reid, to "circumvent the act and secure its benefits by using . . . a true veteran . . . as a mere 'straw[ ]' . . . have been properly denounced by our courts as violative of public policy, entirely void and wholly unenforceable" and "a criminal offense." (*Lala v. Maiorana* (1959) 166 Cal.App.2d 724, 732; see *Young v. Hampton* (1951) 36 Cal.2d 799, 805-806 ["transaction . . . designed to evade the provisions of the"

Reid further alleged that, after the Barneses obtained the loan, she made the down payment, moved into the house, and lived there with her two daughters for the next 16 years. During those years, Reid allegedly made each timely loan payment[2] and over $100,000 in improvements. Nevertheless, Reid alleged, when in 2012 she asked the Barneses to transfer the deed to her so she could devise the property to her children, the Barneses refused

---

Servicemen's Readjustment Act was unenforceable]; *Young v. U.S.* (9th Cir. 1949) 178 F.2d 78, 80 [criminal penalties apply to violations of Servicemen's Readjustment Act]; see generally *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1110-1111 [collecting cases finding contract unenforceable "where nonveterans seek to obtain government benefits and entitlements available to veterans only, either by setting up a strawman veteran or otherwise by falsifying documents"].)

[2] The parties and the trial court described the payments as "mortgage payments." In fact, promissory notes in California are secured by deeds of trust, not mortgages, although deeds of trust and mortgages "perform the same basic function, and . . . a deed of trust is 'practically and substantially only a mortgage with power of sale.'" (*Domarad v. Fisher & Burke, Inc.* (1969) 270 Cal.App.2d 543, 553; see *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 507, fn. 2 ["[t]he deed of trust surpassed the common law mortgage as the 'generally accepted and preferred security device in California' during the 19th and early 20th centuries, before the California Legislature eliminated *most* of the legal and economic distinctions between a mortgage that contains a power of sale and a deed of trust"], disapproved on another point in *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919.) Thus, the parties were making payments on a loan evidenced by a promissory note secured by a deed of trust, not mortgage payments.

and claimed the property was theirs. Reid alleged that several weeks later she learned that Gerald Barnes was instituting an unlawful detainer action against her. Reid's complaint sought, among other things, damages, specific performance of the parties' oral contract, imposition of a constructive or resulting trust, and restitution.

In November 2012 Gerald Barnes did file an unlawful detainer action against Reid. He and Ethel Barnes also filed a cross-complaint in Reid's action asserting several common counts.[3] The cross-complaint alleged that Reid owed the Barneses $100,000, both on an open book account and for money paid to or for her at her request. The court consolidated the two cases.

B. *The Trial*

There was no court reporter at the trial, which took place over several days in April, May, and June 2014. Reid, Gerald Barnes, and Ethel Barnes testified, and the court admitted numerous documents into evidence. In its statement of decision, the court found all three witnesses "were not credible to varying degrees on particular issues" and observed "[t]here were also great gaps in the documentary evidence."

The trial court stated there were two principal issues. The first issue was "whether there was an agreement when the property was purchased that Ms. Reid would have an (unrecorded) ownership interest in it." On this issue, the court

---

[3] "'A common count . . . is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness.'" (*Avidor v. Sutter's Place, Inc.* (2013) 212 Cal.App.4th 1439, 1454.)

found the parties agreed the Barneses would purchase the property for the use of Reid and her children and would finance the purchase through a VA loan; Reid would make the monthly loan payments and pay the taxes, insurance, and maintenance on the property; and "[i]f [Reid] complied with these requirements, at some unspecified time the property would be transferred to her, on condition that the Barnes[es] would be formally taken off the home loan."

The trial court determined the second principal issue was "how much . . . each side . . . put into the property in terms of mortgage payments, taxes, and improvements." On this issue, the court found Reid "made significantly over half the payments on the loan over the years," but she "did not always pay the home loan in full or on time," and "[o]n a variety of occasions, she was 'short' to a greater or lesser extent, and the Barnes[es] made up the shortfall." The trial court cited numerous canceled checks showing Ethel Barnes "paid the mortgage by check on a number of occasions" and Ethel's testimony that "these checks were written in months when [Reid] did not have the necessary money." "However," the court noted, "there was no satisfactory evidence concerning whether [Reid] had given [Ethel] Barnes *any* money in any of those months, and if so, how much. [Ethel] Barnes kept no records of in what months [Reid] was only able to make a partial payment or no payment. The Court is not persuaded it should accept the existence of a canceled check from [Ethel] Barnes as conclusive proof that [Reid] contributed nothing whatsoever in that particular month."

The trial court also stated it understood that all parties wanted the court "to fix the amount in which the Barnes[es] should be reimbursed for their payments over the years toward

the mortgage, taxes and other amounts paid through impounds, should [Reid] be able to refinance the . . . property and cash them out." Having considered "all the evidence, including weighing the credibility of the witnesses," the court determined that this amount was $39,800.

The trial court summarized its rulings on Reid's complaint: "The Court finds that [Reid] has not carried her burden of proof to establish a breach of oral contract, because she did not prove that she made all required payments, nor did she demonstrate compliance with the requirement that the [Barneses] be released from further obligation on the VA loan. For the same reasons, [Reid] did not prove a breach of the implied covenant of good faith and fair dealing, predicated upon the same facts. [Reid] did not prove her claim for breach of fiduciary duty because, in addition to not proving a breach of the terms of the oral agreement, she did not prove to the Court's satisfaction the existence of a fiduciary duty owed to her by the [Barneses]. [Reid] did not prove fraud because she did not show that the [Barneses] made any promises without the intent to perform at the time they were made. [Reid's] claim for unjust enrichment fails because, as pleaded, it was predicated upon her eviction, which has not occurred, rather than on any completed event. [Reid's] claim for constructive trust fails because she proved neither of the predicate theories—fraud or breach of fiduciary duty. [Reid] did not prove extreme or outrageous conduct to support a claim of intentional infliction of emotional distress, or that the Barnes[es]' conduct was intended to cause emotional distress, by a preponderance of the credible evidence." (Fn. omitted.) Concerning the Barneses' claims against Reid, the trial court found the Barneses paid money on Reid's behalf at her request in

the amount of $39,800, did not prove an account stated within the meaning of Code of Civil Procedure section 337a, and made no effort to prove the elements of the unlawful detainer action.

The trial court entered judgment ordering Reid take nothing on her complaint, awarding the Barneses $39,800 on their cross-complaint, and ruling in favor of Reid in the unlawful detainer action. Reid timely appealed.

DISCUSSION

Reid contends (1) the evidence did not support the trial court's findings that she failed to prove her claims for breach of contract, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, and intentional infliction of emotion distress; (2) she is entitled to a resulting trust; (3) the trial court erred in awarding the Barneses $39,800 on their cross-complaint; and (4) she did not ask the trial court to fix the amount she would need to reimburse the Barneses in the event she "cashed them out," as the trial court stated in its statement of decision. We find only her first argument persuasive.

A. *Reid Has Not Provided an Adequate Record To Support Her Appeal from the Judgment on the Complaint*

Reid faces a significant obstacle in her appeal: There is no record of the trial proceedings, whether in the form of a reporter's transcript or a settled statement. "Appealed judgments and orders are presumed correct, and error must be affirmatively shown. [Citation.] Consequently, appellant has the burden of providing an adequate record. [Citations.] Failure to provide an

adequate record on an issue requires that the issue be resolved against appellant. [Citation.] Without a record, either by transcript or settled statement, a reviewing court must make all presumptions in favor of the validity of the judgment[, . . . and] appellant is effectively deprived of the right to appeal." (*Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 935; see *Elena S. v. Kroutik* (2016) 247 Cal.App.4th 570, 576 ["by knowingly forgoing the preparation of a reporter's transcript or a settled statement, [appellant] made success on appeal unattainable"].) In particular, "[w]here no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence." (*In re Estate of Fain* (1999) 75 Cal.App.4th 973, 992.) This defect precludes success on most of Reid's contentions on appeal regarding her claims.

B. *Reid Has Not Shown the Evidence Compels a Finding in Her Favor on the Complaint as a Matter of Law*

We generally review the trial court's factual findings after a court trial for substantial evidence. (See *Mission West Properties, L.P. v. Republic Properties Corp*. (2011) 197 Cal.App.4th 707, 712; *North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 285.) We view all factual matters most favorably to the prevailing party and in support of the judgment, and ordinarily look only at the evidence supporting the

successful party, disregarding the contrary showing, thus resolving all conflicts in favor of that party. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60; accord, *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.)

"'But this test is typically implicated when a defendant contends that the plaintiff succeeded at trial in spite of insufficient evidence.'" (*Sonic Mfg. Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465 (*Sonic Mfg. Technologies*).) Where, as here, "'the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. . . . [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838; accord, *Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 769 (*Almanor*); *Wells Fargo Bank, N.A. v. 6354 Figarden General Partnership* (2015) 238 Cal.App.4th 370, 390; see *In re R.V.* (2015) 61 Cal.4th 181, 201 [where party fails to meet its burden on an issue in the trial court, "the inquiry on appeal is whether the weight and character of the evidence . . . was such that the [trial] court could not reasonably reject it"].)

In fact, "[w]here, as here, the judgment is against the party who has the burden of proof, it is almost impossible for him to prevail on appeal by arguing the evidence compels a judgment in his favor. That is because unless the trial court makes specific findings of fact in favor of the losing plaintiff, we presume the trial court found the plaintiff's evidence lacks sufficient weight and credibility to carry the burden of proof. [Citations.] We have no power on appeal to judge the credibility of witnesses or to reweigh the evidence." (*Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486.)

1. *Breach of Contract*

The trial court ruled that Reid failed to prove her breach of contract claim because she did not prove that, as required by her agreement with the Barneses, she made all the loan payments on the West 134th Place property and complied in getting the Barneses released from further obligation on the VA loan. Reid contends substantial evidence does not support that ruling, though, as noted, that contention misstates the applicable standard of review.

"'It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance.'" (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602; see *ibid.* ["'[o]ne who himself breaches a contract cannot recover for a subsequent breach by the other party'"].) Not every failure by the plaintiff to perform, however, will excuse a defendant's breach: Only a failure to perform that constitutes "a material breach of the contract" may discharge the other party from its duty to perform. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277; see *De Burgh v. De Burgh* (1952) 39

Cal.2d 858, 863 ["in contract law a material breach excuses further performance by the innocent party"]; *Plotnik v. Meihaus*, at p. 1602 [same].)

"Normally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact." (*Brown v. Grimes*, *supra*, 192 Cal.App.4th at p. 277; see *Schellinger Brothers v. Cotter* (2016) 2 Cal.App.5th 984, 1002 ["[w]hether a breach is material is usually left to the trier of fact 'to determine from all the facts and circumstances shown in evidence'"]; cf. *Insurance Underwriters Clearing House, Inc. v. Natomas Co.* (1986) 184 Cal.App.3d 1520, 1526-1527 ["if reasonable minds cannot differ on the issue of materiality, the issue may be resolved as a matter of law"].) "Whether a partial breach of a contract is material depends on 'the importance or seriousness thereof and the probability of the injured party getting substantial performance.'" (*Brown v. Grimes*, at p. 278; see *Murphy v. Sheftel* (1932) 121 Cal.App. 533, 540 [a failure or defect in performance that is "so essential as to substantially defeat the object which the parties intended to accomplish" is material].)

Reid does not challenge the trial court's finding that, under the terms of the parties' agreement, the Barneses would have to transfer the West 134th Place property to Reid only if she paid the monthly loan payments, taxes, insurance, and maintenance on the property. Nor does Reid dispute that at least 33 times she failed to make the full monthly loan payment, as reflected by canceled checks showing Ethel Barnes's payment of the loan in certain months and Ethel's testimony that she wrote those checks in months when Reid did not have the necessary money. What Reid challenges is the trial court's implied finding that her failure

to make those payments constituted a material breach of her obligations under the parties' agreement.

It was Reid's burden to prove that her failure to make all the monthly loan payments was *not* a material breach. (See *Sonic Mfg. Technologies*, *supra*, 196 Cal.App.4th at p. 464 ["'[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting'"], quoting Evid. Code, § 500; *Roscoe Moss Co. v. Jenkins* (1942) 55 Cal.App.2d 369, 374 [in a breach of contract action it is necessary "for plaintiff to allege and, if it was denied, to prove performance of the contract on its part"].) Reid points to no "uncontradicted and unimpeached" documentary evidence compelling a finding that her failure to make full loan payments on 33 occasions was not a material breach as a matter of law. (*Sonic Mfg. Technologies*, at p. 466.) Moreover, we must presume the unreported trial testimony established that Reid's failure to perform was indeed a material breach. (See *In re Estate of Fain*, *supra*, 75 Cal.App.4th at p. 992.)[4]

2. *Breach of Implied Covenant of Good Faith and Fair Dealing*

---

[4] We need not, and do not, consider Reid's contention that the trial court erred when it found she also failed to prove her breach of contract claim because she did not show she complied in getting the Barneses released from further obligation on the loan.

After finding Reid had failed to prove her breach of contract claim, the trial court stated, "For the same reasons, [Reid] did not prove a breach of the implied covenant of good faith and fair dealing, predicated on the same facts." Reid contends this was error because, again, "[t]here is no substantial evidence that [she] caused a material breach of the oral contract to permit the Barnes[es] to abandon the whole contract."

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. [Citation.] The covenant thus cannot "'be endowed with an existence independent of its contractual underpinnings.'" [Citation.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 349-350; accord, *Avidity Partners, LLC v. State* (2013) 221 Cal.App.4th 1180, 1204.) Thus, as with her breach of contract claim, Reid had the burden of proving on her claim for breach of the implied covenant that she performed or was excused from performing her obligations under the contract. (See *Avidity Partners, LLC v. State*, at p. 1204 ["'[t]he implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation'"]; *Thrifty Payless, Inc. v. Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244 ["[t]he covenant . . . requires each party to do everything the contract presupposes the party will do to accomplish the agreement's purposes"].)

As discussed, however, Reid has failed to show the evidence compels a finding that her failure to perform her obligations under the contract was not a material breach. Therefore, she has

failed to show the evidence compels a finding that she proved her claim for breach of the implied covenant of good faith and fair dealing. Reid has also failed to show the evidence compels a finding in her favor on her claim for breach of the implied covenant because the court may "disregard" such a claim where, as here, it "relies on the same alleged acts and seeks the same relief claimed in [a] breach of contract action." (*Avidity Partners, LLC v. State*, *supra*, 221 Cal.App.4th at p. 1203; see *Bionghi v. Metropolitan Water Dist. of So. Calif.* (1999) 70 Cal.App.4th 1358, 1370 [claim for breach of implied covenant that relied on same facts and sought same relief as claim for breach of contract was "duplicative" and could "be disregarded"]; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [if allegations of a claim for breach of the implied covenant "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated"].)

3. *Breach of Fiduciary Duty*

The trial court found "Reid did not prove her claim for breach of fiduciary duty because, in addition to not proving a breach of the terms of the oral agreement, she did not prove to the Court's satisfaction the existence of a fiduciary duty owed to her by the Barnes[es]." Reid contends that there was "substantial evidence of a fiduciary relationship" because the Barneses (probably illegally) "used their credit and veteran benefits to purchase a home on [her] behalf . . . ."

"""The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach.""" (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 140.) "'[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law.'" (*Ibid.*; accord, *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 632; see *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 416 (*GAB Business*) ["[t]here are *two kinds* of fiduciary duties—those imposed by law and those undertaken by agreement"], disapproved on another ground in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140.)

"Fiduciary duties arise as a matter of law 'in certain technical, legal relationships,'" such as those between partners or joint venturers, husbands and wives, guardians and wards, trustees and beneficiaries, principals and agents, and attorneys and clients. (*Oakland Raiders v. National Football League*, *supra*, 131 Cal.App.4th at p. 632; accord, *Hasso v. Hapke*, *supra*, 227 Cal.App.4th at p. 140.) "A fiduciary duty is undertaken by agreement when one person enters into a confidential relationship with another." (*GAB Business*, *supra*, 83 Cal.App.4th at p. 417; accord, *Hasso v. Hapke*, at p. 140.) Such "'a confidential relationship arises 'where a confidence is reposed by one person in the integrity of another, and . . . the party in whom the confidence is reposed, . . . voluntarily accepts or assumes to accept the confidence.'" (*GAB Business*, at p. 417.) """The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms because the person in

whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party.'"' (*Brown v. Wells Fargo Bank, NA* (2008) 168 Cal.App.4th 938, 960; see *City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 389 [contracting party's vulnerability did not give rise to fiduciary obligations, "which generally come into play when one party's vulnerability is so substantial as to give rise to equitable concerns underlying the protection afforded by the law governing fiduciaries"].) Whether a confidential relationship exists is a question of fact. *(Hasso v. Hapke*, at p. 140; *Dino v. Pelayo* (2006) 145 Cal.App.4th 347, 353.)

Reid does not identify any relationship between her and the Barneses that would impose fiduciary duties on the Barneses as a matter of law, and the record (such as it is) suggests none. Nor does Reid point to any "uncontradicted and unimpeached" evidence that might compel a finding, as a matter of law that she and the Barneses entered into a confidential relationship. (*Almanor*, *supra*, 246 Cal.App.4th at p. 769.) In particular, even assuming Reid reposed some trust and confidence in her mother and stepfather when she entered into her oral agreement with them, "'[e]very contract requires one party to repose an element of trust and confidence in the other to perform,'" and Reid has not established that her vulnerability in the transaction was so substantial that, as a matter of law, it created fiduciary obligations on the part of the Barneses. (*City of Hope Nat. Medical Center v. Genentech, Inc.*, *supra*, 43 Cal.4th at p. 389.) Again, we must presume the unreported trial testimony supported the trial court's finding.

4. *Intentional Infliction of Emotional Distress*

The trial court found "Reid did not prove extreme or outrageous conduct to support a claim of intentional infliction of emotional distress, or that the Barnes[es]' conduct was intended to cause emotional distress, by a preponderance of the credible evidence." Reid contends this was error because there was substantial evidence the Barneses filed their cross-complaint and the unlawful detainer action to punish her.

"Intentional infliction of emotional distress requires a plaintiff to prove: ""(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct . . . .' Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.] The defendant must have engaged in "conduct intended to inflict injury or engaged in with the realization that injury will result."" (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 902; accord, *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) "When the evidence is conflicting or when conflicting inferences may be drawn from the evidence, the existence of each of these elements is, of course, a question of fact." (*Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 461; see *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1045 ["[i]n the usual case, outrageousness is a question of fact"].)

Reid argues that, when she filed this action against the Barneses, it was "widely known" among her friends and family that she had been hospitalized on several occasions for mental and physical health problems. She suggests that, despite

knowing this, the Barneses filed their cross-complaint and the unlawful detainer action against her to cause her financial hardship. But Reid does not cite "uncontradicted and unimpeached" evidence establishing, as a matter of law, that the Barneses engaged in extreme or outrageous conduct or had any intent to cause her emotional distress. (*Almanor*, *supra*, 246 Cal.App.4th at p. 769.) We must also presume the trial testimony showed that the Barneses did not engage in such conduct or any such an intent. (*Randall v. Mousseau*, *supra*, 2 Cal.App.5th at p. 935.)

C. *The Evidence Did Not Establish a Resulting Trust*

The trial court found Reid's claim for constructive trust failed because she proved neither of the theories on which she predicated the claim, fraud and breach of fiduciary duty. Reid does not challenge that ruling, but contends the evidence supported her recovery on another trust theory, that of a resulting trust. Reid concedes she did not advance that theory in the trial court. Nevertheless, citing *Ward v. Taggart* (1959) 51 Cal.2d 736, she contends she can advance the theory on appeal because it presents only a question of law. (See *id.* at p. 742 ["it is settled that a change in theory is permitted on appeal when 'a question of law only is presented on the facts appearing in the record'"].)

"'A resulting trust arises by operation of law from a transfer of property under circumstances showing that the transferee was not intended to take the beneficial interest. [Citations.] Such a resulting trust carries out and enforces the inferred intent of the parties.'" (*Fidelity Nat. Title Ins. Co. v. Schroeder* (2009) 179 Cal.App.4th 834, 847; cf. *ibid.* [a

constructive trust, by contrast, rectifies a fraud or other wrongful act by one of the parties].) "Ordinarily a resulting trust arises in favor of the payor of the purchase price of the property where the purchase price, or a part thereof, is paid by one person and the title is taken in the name of another. [Citations.] 'The trust arises because it is the natural presumption in such a case that it was their intention that the ostensible purchaser should acquire and hold the property for the one with whose means it was acquired.'" (*Martin v. Kehl* (1983) 145 Cal.App.3d 228, 238; cf. *id.* at p. 243 [subsequent monetary contributions for improvements or installment payments do not give rise to a resulting trust].)

But "[a]lthough partial payment of the consideration for property may give rise to a resulting trust to the extent of the payment, the burden is on the party who asserts a pro tanto trust to establish with definiteness and specificity the proportional amount contributed. . . . 'A resulting trust cannot be enforced in favor of a person who has paid part of the consideration for the transfer of property unless it is possible to clearly establish the amount of money contributed by him [or her] or the proportion of his [or her] contribution to the whole purchase price. [Citations.] One who claims a resulting trust in land must establish clearly, convincingly and unambiguously, the precise amount or proportion of the consideration furnished by him [or her]. [Citation.] If the claimant does not, then the presumption of ownership arising from the legal title is not overcome and a resulting trust will not be declared.'" (*Lloyds Bank California v. Wells Fargo Bank* (1986) 187 Cal.App.3d 1038, 1044 (*Lloyds*); accord, *Laing v. Laubach* (1965) 233 Cal.App.2d 511, 517; see *Socol v. King* (1950) 36 Cal.2d 342, 348 ["the burden of proving the elements necessary to establish a resulting trust rests on the

party asserting it, and one who relies on a *pro tanto* trust must establish definitely the proportional amount of the purchase price contributed," and "[i]n the absence of such proof, a resulting trust will not be declared"].)

Reid argues that the evidence established a resulting trust in her favor because the trial court found she paid the closing costs for the purchase of the West 134th Place property and made significantly more than half the payments on the loan over the years. But even assuming payment of "closing costs" counts as a contribution toward the purchase price for purposes of determining whether there is a resulting trust, the trial court did not find Reid paid any specific amount in closing costs. Reid asserts that she testified at trial she paid approximately $6,000 in closing costs and Ethel Barnes testified Reid paid "about" $5,500 on the down payment.[5] As noted, however, there is no record of any such testimony. Because Reid cites to no evidence showing "clearly, convincingly and unambiguously" the precise amount of consideration furnished by Reid toward the purchase of the West 134th Place property, she has not established a right to a resulting trust. (*Lloyds*, *supra*, 187 Cal.App.3d at p. 1044.)

D. *The Trial Court's Ruling on the Cross-Complaint Must Be Reversed*

Reid challenges the trial court's award of $39,800 on the Barneses' cross-complaint on what appear to be three grounds: (1) there was no evidence of an open book account,[6] (2) there was

---

[5] On the other hand, Reid describes the loan used to purchase the property as a "No Money Down" loan.

[6] The trial court did not rule that the Barneses had proved an open book account (indeed, the court found they had not), but

insufficient evidence to support the court's finding that the Barneses contributed $39,800 toward the loan, taxes, and other amounts paid on the West 134th Place property, and (3) the two-year statute of limitations barred the court from considering some of the checks Ethel Barnes wrote to cover the monthly loan payments.[7] We agree with Reid's second contention because the trial court's statement of decision shows that there was insufficient evidence to support the award.

As noted, in the absence of a reporter's transcript, an appellate court will generally presume that the judgment is correct. (*Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039.) This rule applies, however, only "'on matters as to which the record is silent.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see *Chalmers v. Hirschkop* (2013) 213 Cal.App.4th 289, 299 ["if the record is silent we indulge all reasonable inferences in support of the judgment or order"]; *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1550 [presumption of correctness "applies only on a silent record"].)

The presumption of correctness does not apply to the court's ruling on the Barneses' cross-complaint because the record is not silent. Instead, the statement of decision demonstrates

---

that they had proved their common count for money paid on Reid's behalf at her request. (See *Rains v. Arnett* (1961) 189 Cal.App.2d 337, 344 [common count claim for money paid will lie where "one pays out money for the benefit of another, at the latter's request"].)

[7] Generally, the statute of limitations for a common count based on an oral agreement is two years. (See Code Civ. Proc., § 339; *Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc.* (1989) 208 Cal.App.3d 1297, 1308.)

that substantial evidence does not support the trial court's ruling. The trial court stated it was "persuaded that [Reid] did not always pay the home loan in full or on time," and "[o]n a variety of occasions, she was 'short' to a greater or lesser extent, and the Barnes[es] made up the shortfall." The court, however, found that the evidence was not sufficient to determine the amount of the shortfall: "The records of the parties are not sufficient to permit a precise calculation, and there was insufficient credible testimony to make up the gap." The court noted that Ethel Barnes "kept no records of in what months Ms. Reid was only able to make a partial payment or no payment." Yet, in the absence of sufficient documentary evidence and credible testimony to calculate this amount, because the parties "desire[d] the Court to fix the amount in which the Barnes[es] should be reimbursed for their payments over the years toward the mortgage, taxes and other amounts paid through impounds, should [Reid] be able to refinance the 134th Place property and cash them out," the court was "persuaded that sum should be set at $39,800.00."

The $39,800 money judgment against Reid on the cross-complaint cannot stand. First, the court found there was insufficient evidence to calculate that the amount was $39,800. The court found the witnesses' testimony and the documentary evidence was insufficient to determine the amount, and there is no other kind of evidence in this type of case. Second, even if there were substantial evidence to support the trial court's ruling, the court should not have entered a money judgment against Reid. The court stated it was determining the amount Reid would have to pay the Barneses *if* Reid were able to refinance the property and cash out the Barneses. The court,

however, did not find that Reid was able to refinance the property or cash out the Barneses. The court's ruling was a kind of a declaratory judgment (which the Barneses did not request in their cross-complaint and Reid argues she did not want) advising the parties how much Reid would have to pay in the future if certain conditions were met. The court should not have entered a money judgment requiring Reid to pay a specific sum in the absence of satisfaction of those conditions.

DISPOSITION

The judgment on Reid's complaint and the judgment on Gerald Barnes's unlawful detainer complaint is affirmed. The judgment on the Barneses' cross-complaint is reversed. Reid is to bear her costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.